(13)

In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 1036

THE STATE OF OHIO, *ex rel.*, HUGH M. FOSTER,
A Taxpayer,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio
and
BRIEF OF PETITIONER.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of The United States.

Your Petitioner, The State of Ohio *ex rel.* Hugh M. Foster, a taxpayer, respectfully shows as grounds for the issuance of writ of certiorari to the Supreme Court of Ohio:

A.

SUMMARY STATEMENT.

Ohio is a sovereign State of the United States of America. Hugh M. Foster is and was at all times mentioned herein a taxpayer in said state.

Note: Emphasis supplied by italics, or otherwise in this petition is ours unless specially noted.

(R. . .) refers to the Record of the Supreme Court of Ohio.

The Volumes of the Record cover pagination as follows:

Vol. 1—pages 1 to 464, inclusive;
Vol. 2—pages 465 to 904, inclusive;
Vol. 3—pages 905 to 979, inclusive.

The Opinion of the Supreme Court of Ohio appears on pages 953 to 972, inclusive of Vol. 3.

This action was originally filed in the Court of Appeals, Franklin County, Ohio, Case No. 3325, as a mandamus suit, to safeguard the public revenue of Ohio and prevent fraud on the revenue arising from the levy and collection of taxes upon retail sales.

The case was heard upon the second amended petition, the answer and the reply. (pp. 1-9, R. Vol. 1.)

The collections of the Ohio Sales Tax were made by licensed vendors from consumers at rates specified in the statute. Retail vendors of taxable merchandise were required to purchase from the State Treasurer prepaid tax receipts and when a retail sale was made the vendor was required to cancel such prepaid tax receipts covering the correct amount of the tax, keep one part and deliver the other part to the consumer. This evidenced at the time of the sale, the payment of the tax to the state through the vendor (Sec. 5546-3 G. C.). All such prepaid receipts were redeemable at any time by the vendor for face value (Section 5546-8 G. C.).

The plaintiff therein was the State of Ohio, *ex rel.* Hugh M. Foster, a taxpayer. The defendant was William S. Evatt, Tax Commissioner for the State of Ohio. The plaintiff sought a writ of mandamus to compel the Tax Commissioner to perform a specific duty to make an assessment for "personal liability" as provided in Section 5546-9a G. C. against the Kroger Grocery and Baking Company and against the Great Atlantic and Pacific Tea Company, for deficiencies in accounting for sales taxes levied on taxable retail sales made by them in the year 1935 as shown by sworn reports filed by such vendors and as further shown and found by the audits of the books and records of such retail sales of said vendors *made by the Tax Commission.*

The statute was enacted December 13, 1934—115 O. L. Pt. 2, Page 306, and was originally known as G. C. Ohio Sections 5546-1 to 17 inclusive, but now known as Sections

5546-1 to 24c inclusive, and the object and purpose of the Act as set forth in the title thereto and in Section 5546-2 is "The levy and collection of a tax upon sales of personal property at retail * * * for the purpose of public revenue, * * * poor relief, schools and local governments."

The rates were specified in Section 5546-2 G. C. as follows: 1 cent if the price is 40 cents or less; 2 cents if the price is between 40 cents and not more than 70 cents; 3 cents if the price is more than 70 cents and not more than $1; if the price is less than 9 cents, no tax shall be imposed, i.e. no tax shall be collected from the consumer; *if the price is in excess of one dollar, three cents on each full dollar thereof.*

It was provided that the tax shall apply and be collected from the consumer by the vendor when the sale is made.

In the same section there were enumerated several transactions numbered one to ten inclusive to which the tax did not apply. None of these exemptions are involved in this cause.

To enable the Tax Commission to effectually "administer and enforce the provisions of the Act" as provided in Section 5 and Section 9a, Section 2 further provided:

> "For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established."

This section of the act was enacted to aid the Commission in enforcing each and all the provisions of the act including Section 5546-9a G. C. and to prevent evasions and frauds of vendors of taxable merchandise and was particularly applicable in the case of vendors who did not keep accurate records of sales as required by Section 5546-12 G. C. and who became personally liable under Section 5546-9a G. C.

This presumption was further enacted to enable the Tax Commissioner within the limits, standards and policy fixed in the statute to establish classifications under a rule and regulation of the Commission, promulgated as hereinafter alleged for the purpose of enabling the Tax Commissioner to assess the amount of personal liability established in Section 5546-9a G. C., following the rule laid down in *Jones vs. Brim*, 165 U. S. 180, 183-184.

Section 5546-12 provides that:

> "Each vendor shall keep such record of sales together with invoices, bills of lading, retained parts of cancelled prepaid tax receipts, and such other pertinent documents, in such form as the commission may by regulation require."

Section 5546-5 provides for the Tax Commission procuring the prepaid tax receipts. Section 5 further provides that:

> *"The Commission shall enforce and administer the provisions of this act * * *. It shall have power to adopt and promulgate such rules and regulations as it may deem necessary to carry out the provisions of this act * * *"*

To enable the Tax Commission to more effectually "enforce and administer the provisions of the act" as enjoined in Section 5, Section 5546-9a, further provides:

> "In case any vendor fails to collect the tax herein imposed, or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this act and by the regulations of the commission, he shall be *personally liable for such amount as he failed to collect, or for the amount of the prepaid tax receipts which he failed to cancel.*
>
> *"In such case the commission shall have power to make an assessment against such vendor based upon any information within its possession or that shall come into its possession. * * *"*

The same section then provided that "*the amount*" *so assessed,* "*together with a penalty of fifteen per centum thereof*" shall be due and payable from the vendor to the Treasurer of State within 15 days after service of notice upon such vendor of such assessment and when payable shall draw 12 per cent interest per annum.

The vendor is given the right after such notice to petition for re-assessment and after action upon such re-assessment, *the vendor was given the right to appeal to the Court of Common Pleas.*

None of these sections have been repealed or changed so far as it relates to the duty, rights, power and obligations of any vendor, the consumer, or the Tax Commission, under Sections 5546-2-3 and 5 or as it established the personal liability of the vendor thereunder as fixed by Section 9-a. (See Evatt Testimony, pp. 539-540, Vol. 2 R.)

It is contended by petitioner that this tax law is complete in all of its essential parts, so far as it relates to the primary power delegated to the legislature; that the policy of the law is established; that the standards, duty, liability and obligation were established; that the principles governing administrative action are established; that full and complete power is lawfully delegated to the Tax Commissioner to protect the public revenue and insure an honest, accurate and full accounting for all taxes levied and collected.

The Commission did adopt rules and regulations in 1935, part of which were Plaintiff's Exhibit No. 1, (p. 294, Vol. 1 R.) and an auditor's field manual, Plaintiff's Exhibit No. 2 (p. 295, Vol. 1 R.), which were issued to all officers and employees of the Tax Commission. (Exhibit No. 2 contained Section "F" which designated the procedure for auditors and inspectors to follow in auditing the business, books and sales of a vendor for the purpose of securing "information" upon which to make an assess-

ment.) This auditing procedure was never withdrawn, as stated by the court, just abandoned as alleged herein.

The rules and regulations and field manual do not in any sense affect the substantive provisions of this tax law, but on the contrary were formulated as methods of fact finding to discover evasions of the law and fraud on the part of vendors. *The rules themselves were based upon fact finding* and were the result of the efforts of statistical experts in the Tax Department, spot checks of the daily business of various classes and types of vendors and by investigation and inspection of monthly reports of vendors. It was found upon such study that large grocery chain stores to which class the Kroger Grocery and Baking Company and the Great Atlantic and Pacific Tea Company belonged showed that such chain stores should collect and cancel prepaid tax receipts a sum equal to 3.30 per cent of their taxable retail sales. (pp. 583-585, R. Vol. 2.) The head of the Sales Tax Division testified the enforcement of this percentage rate resulted in producing records, which vendors had concealed. (pp. 586-587, R. Vol. 2.)

The cause in the Court of Appeals on March 25, 1942, was referred to Former Chief Justice of the Supreme Court of Ohio, Carrington T. Marshall as Special Master Commissioner, with all the powers of a Referee in Chancery. (pp. 20-21, R. Vol. 1.)

In the Court of Appeals, the Tax Commissioner was represented by Attorney James N. Linton, a prominent politician, who was appointed as special counsel without pay, by the Attorney General to represent the Tax Commissioner Evatt in that case. Attorney Linton had been attorney for the Great Atlantic and Pacific Tea Company in an earlier case in the Supreme Court, Case No. 27,500, involving the same facts but not the same legal issues.

The Master Commissioner (pp. 835-896, R. Vol. 2) filed his report with findings of fact and conclusions of law with the Court of Appeals, December 8, 1942.

The finding and judgment of the Court of Appeals (pp. 23-26, R. Vol. 1), confirmed the finding and conclusions of law of the Master Commissioner, and it was the judgment of that Court that the information in the possession of the Tax Commission covering 1935 sales showed that the A. & P. Company was personally liable in the sum of $235,152.90 together with a 15 per cent penalty computed on a basis of 3 cents on each full dollar of taxable retail sales, that the Kroger Grocery and Baking Company was personally liable in the sum of $143,140.96 together with a 15 per cent penalty for the period from January 27, 1935, to September 7, 1935, computed on a basis of 3 cents on each full dollar of taxable retail sales; that the Commission in the lawful exercise of power delegated to it had adopted a valid rule and regulation based upon research and fact finding that such grocery chain stores should collect on their taxable retail sales and cancel prepaid tax receipts amounting to 3.30 per cent of their taxable sales; the Tax Commissioner was ordered to make an assessment based upon such information and give notice thereof to each of said vendors and thereupon sustained the prayer of plaintiff's second amended petition. (See pp. 67-68 Appendix.)

Not a single witness was produced by the Tax Commissioner to dispute any of the facts contained in said reports or audits or the facts as found by the Master Commissioner and the Court of Appeals.

Thereafter said Tax Commissioner resisting the order of the Court of Appeals, represented by said Linton, appealed from the judgment of the Court of Appeals to the Supreme Court of Ohio on questions of law. The record shows that other attorneys for Kroger and A. & P. were constantly present at the hearings before the Master and counseling with the special counsel.

Said appeal was heard on the 21st day of March, 1944, and decision rendered August 9th, 1944 (pp. 906, 908, R. Vol. 3.)

When this case was called for hearing on the merits on March 21, 1944, Justice Hart, having theretofore informed the court of some interest in the case, retired from the bench without further words or explanation. Justice Turner then arose to his feet with books and papers in hand and stated, in substance, that he did not believe he should sit in this case as he was a lessor to the Kroger Grocery and Baking Company, one of the chain store corporations, affected by the issues in this case, and that his rent was collected on a percentage basis of the monthly gross receipts. (See affidavit relator, p. 926, R. Vol. 3 and p. 974, R. Vol. 3.) It was alleged in relator's affidavit that Judge Turner had another lease on a percentage rental to another department store, the R. & S. Dime Stores. Judge Turner did not disclose this fact.

In fairness to Judge Turner, it must be said that he filed an affidavit (p. 920 and p. 930, R. Vol. 3) in the case explaining in some detail the terms of his lease to the Kroger Company but he did not gainsay the fact that that lease was on a percentage basis, and this record shows that all the taxes which were illegally withheld by the Kroger Company augmented the gross receipts of that company upon which Judge Turner's percentage was calculated. In Judge Turner's affidavit he made no denial relative to the R. &. S. Dime Store lease.

Judge Turner's affidavit is at once an admission of interest in the controversy and a confession of his prejudice. His affidavit should be analyzed. In the second paragraph he admits:

> "Affiant's lease to the Kroger Grocery and Baking Company and subsequent renewals thereof provided for a percentage rental based on gross sales which were payable *without any deductions for taxes of any kind.*"

In the same paragraph Judge Turner predicates his affidavit upon the principal point in the entire controversy wherein he says there is no evidence of the collection of

taxes for which the vendor failed to account. It is in the 6th paragraph that Judge Turner confesses his interest. We quote:

> "Said lease provided for a flat rental plus a percentage of the annual gross retail sales in excess of a stated amount. In such lease it was provided that certain painting, altering and remodeling were to be made in the leased premises at the expense of lessor and that lessee was to advance sufficient funds therefor. Such funds were to be repaid by merely withholding any and all percentages of excess rental but with the provision that if such percentages were not sufficient to liquidate the cost of such painting, altering and remodeling, the unpaid balance should be cancelled and the lessor released from further liability thereon."

It is thus admitted that the altering and remodeling was to be done by the lessor, and it follows that the altering and remodeling increased the value of the premises by the amount of the cost thereof.

The affidavit further states in Paragraph 6 that:

> "Painting, altering and remodeling had cost the sum of $2174.66 which amount was $906.48 in excess of the percentage rentals earned * * *."

Surely it can make no difference whether the percentages which were payable to Judge Turner were more or less than the cost of the alterations. It does appear, however, that even for the fraction of the year 1935 from July 18th to December 31st Judge Turner's percentage amounted to $1268.18, being the difference between the total costs of the improvements and the amount of percentages which was agreed upon as being in excess of the minimum flat rental.

Taking Paragraph 6 in conjunction with Paragraph 7 of the affidavit, we find that it is apparent that Judge Turner seeks to draw a distinction between "possible financial interest" and benefits by reason of improvements to his building, paid for out of those percentages. It will be

observed that in Paragraph 7, it is stated that he was "clearly of the opinion that he had no possible financial interest in the outcome of the case." It must be borne in mind, however, that the judgment entered in this case by the Supreme Court of Ohio is such as to foreclose any inquiry into the shortcomings of the Kroger Grocery Company during all the years subsequent to 1935. By erroneously declaring that the burden is upon the State of Ohio to prove specific sales, and it being admitted that the Kroger Company kept no record of specific sales, the Kroger Company is permitted to make a profit out of the sales tax of the entire excess over 2.50% for the years 1935 and 1936 and the entire excess over 3% for all subsequent years, upon all of which excess Judge Turner receives 5%.

The issue of Judge Turner's disqualifying interest and the denial of due process of law and the equal protection of the laws under the 14th amendment in rendering the decision and judgment in the Supreme Court was raised by application for rehearing (Paragraph 8, p. 920, R. Vol. 3) and also on motion to vacate the judgment (p. 973, R. Vol. 3 and p. 923, R. Vol. 3) on the ground of his interest but the application for re-hearing and the motion to dismiss were both overruled November 22, 1944 by the court with Judge Turner's concurrence. (pp. 907-909, 910, R. Vol. 3.) The action of the Court on the motion was set aside. (p. 910, R. Vol. 3.) The motion was again overruled December 20, 1944. (p. 910, R. Vol. 3.) Applications for rehearing in the Ohio Supreme Court can only be argued on brief. The Attorney General's office by special counsel Linton filed a brief in which they also sought to make the point that objection to Judge Turner was not timely made. The answer to this is first, that the case was heard on its merits out of the regular order, and the counsel who signs this petition and who was the principal counsel in the case, had not yet arrived in the courtroom and knew nothing about Judge Turner's admission of his disqualification. Petitioner was

not consulted (p. 927, R. Vol. 3.) Second, the action of the Supreme Court raised the opportunity to raise the question. Third, the relator representing the State and the interest of several million taxpayers in Ohio in a suit to recover for the State taxes unlawfully withheld would have no right to waive the disqualification of a judge. Fourth, that the interest of Judge Turner was pecuniary and continuing each and every year since 1935, and the disqualification was based on public policy. The decision and judgment thereon affect the current every-day administration of the act. Fifth, no disclosure was made of the lease to R. & S. Dime Stores at the hearing. Sixth, there is no waiver or estoppel of record here, but Judge Turner did admit he had a percentage interest in the gross receipts of Kroger. The amount is affected by his conclusions. Under such conditions it is difficult to get a correct record. *Gregory v. Railroad,* 4 O. S. 678.

Evatt, Tax Commissioner, testified (p. 842, R. Vol. 2) that the State has no remedy against a licensed vendor who does not keep records of specific sales, to compel him to account for taxes levied and collected under Sections 2, 3, 5 and 9-a.

In so holding Mr. Evatt has ignored Section 5546-2 which declares a presumption of taxability.

Upon the same point the Ohio Supreme Court has declared as its third syllabus:

> "Where a specific retail sale of tangible personal property is shown to have been made by a vendor during the year 1935, such sale is presumed to be subject to the tax levied by Section 2 of such Sales Tax Act and the burden of proof to establish the contrary is upon the vendor."

It is plainly apparent that Judge Turner has entirely missed the point in the application of this section relating to presumption. Manifestly there is no occasion to apply the presumption where proof is made of "a specific retail sale of tangible personal property," and it is apparent

that the Legislature intended that the burden should be placed upon the vendor in all cases where by reason of the failure to keep records of sales as provided by Section 5546-12 it becomes impossible for the Tax Commissioner to check the accuracy of the vendors' reports. Judge Turner, 144 O. S. p. 102, 56 N. E. Rep. (2nd) p. 281, pars. 8-9, (p. 968, R. Vol. 3), said *"The record does not disclose the making of any taxable sale."*

The sworn reports of these vendors and the audits of the Tax Commission disclose the making of millions of dollars of taxable sales, which are admitted and not disputed. It was the contention of the plaintiff that if each specific sale was proved the law applied the rate automatically and it would not be necessary to use the presumption enacted to prevent the evasion of the tax, 144 O. S. 65, 66, 56 N. E. Rep. (2nd) 266 (p. 953, R. Vol. 3), first and third syllabi. The dissenting opinion opposed this theory. (p. 971, R. Vol. 3.)

The key position of Judge Turner in the final adjudication of this case in the Ohio courts is shown by the fact that this case was first heard by Carrington T. Marshall appointed by the Court of Appeals as a Master Commissioner with all the powers of a Referee in Chancery. Mr. Marshall was a former Chief Justice of the Ohio Supreme Court and his standing as a jurist was very high.

A large volume of testimony was taken before him, and he made comprehensive findings of fact and conclusions of law, which findings of fact and conclusions of law on review by the full Court of Appeals and upon comprehensive briefs and lengthy oral arguments were approved and confirmed by unanimous vote of the Court of Appeals consisting of three judges. The case was appealed to the Supreme Court and in that court the opinion was written by Judge Turner, concurred in by three other judges, making a bare majority of the court. Two judges, Zimmerman and Williams, wrote a strong dissenting opinion. As the matter stands there-

fore there were six judges of the opinion that the assessment should be levied and four judges including Judge Turner were of a different opinion.

Tax Commissioner Evatt, the defendant in this case, was unwilling to levy a deficiency assessment against these two vendors which would have had the effect of putting the burden upon those vendors to establish the correctness of their tax returns as contemplated by the statute, Sections 5546-2 and 5546-9a, thereby enabling the state, upon a hearing to present further evidence of the liability of such defaulting vendor as contemplated by Section 5546-9a. This burden was held by the dissenting opinions in the Supreme Court to properly rest upon the vendors.

Evatt appealed from the adverse judgment in the Court of Appeals to the Supreme Court, although Justice Turner when Attorney General, O. A. G. 1927. R. p. 689, No. 397, held that "when a Court makes an order against an administrative officer, he must obey the order, and has no authority to question its legality," notwithstanding a contrary opinion of the Attorney General.

The Attorney General went before the referee and testified that he made the appointment of Mr. Linton in writing and stipulated that Mr. Linton was to receive nothing from the State of Ohio for his services (pp. 645, 647, 650, R. Vol. 2), Plaintiff's Exhibit No. 33. The Attorney General said he saw no conflict between the interests of the state herein and the interests of Kroger and A. & P. (pp. 650-655, R. Vol. 2.) This record does not show whether the A. & P. Company paid Mr. Linton or whether they even promised to do so. Mr. Linton refused to answer questions on that matter. (pp. 32-35, R. Vol. 1.) Surely the presumption prevails that he did receive a proper compensation from the A. & P. Company and possibly the Kroger Company. It was stated in the application for rehearing in the Supreme Court that A. & P. and Kroger were to finance or did finance the defense in the Court of Appeals

and the prosecution of the appeal, p. 27 Second Supplemental Application for Rehearing. (Page 994 original record.) That statement was not denied. The Attorney General collaborated with the attorney for A. & P. in preparing the answer and defense in the Court of Appeals. (p. 566, R. Vol. 2.)

In making the appeal the Tax Commissioner was required to print all of the oral testimony taken before the referee and also the report of the referee and the brief of Mr. Linton. The printing bill for printing the record alone was $1500.00. A voucher was presented to the State Auditor of Ohio therefor and the Auditor at first refused payment, but was later compelled by mandamus at the suit of the Attorney General to pay same.

This cause was argued orally before the Supreme Court of Ohio on March 21, 1944, and although the issues were within comparatively limited range, a final judgment was not announced until August 11, 1944.

The record shows the defense in the Court of Appeals and the prosecution of the Appeal was not in the interest of the state but of Kroger and A. & P. Gen. Code, Ohio Sec. 336, permits appointment of special counsel by Attorney General only if the interests of state require it. Linton did not represent the state. He was laboring to keep the state from getting its revenue and permitting large vendors, such as his client, who was A. & P., to keep the revenue for which they did not account when they refused to keep records of sales. The Tax Commissioner and special counsel adopted the scheme of defense and justification conceived by Kroger's Tax Lawyer in 1936 (pp. 436-452, R. Vol. 1) when the audit was made. (pp. 115-116, R. Vol. 1.)

The Master Commissioner found that the sworn reports filed by the A. & P. Company and the audits of the books of account of the A. & P. Company showed that the cancellation of prepaid tax receipts of the A. & P. company were only 2.47 per cent of the value of all sales of taxable

merchandise which means that the State of Ohio received only *2.47 per cent* as taxes calculated upon all sales of taxable merchandise *after all legal claims for exemption were allowed*; the Master Commissioner also found that the sworn reports of the Kroger Company and the audits of the books of accounts of the Kroger Company showed that the cancellation of prepaid tax receipts of the Kroger Company were only 2.50 per cent of the value of all sales of taxable merchandise which means that the State of Ohio received only *2.50 per cent* as taxes calculated upon all sales of taxable merchandise *after all legal claims for exemption were allowed*; the Court of Appeals confirmed these findings of the Master Commissioner and the opinion of Judge Turner in the Supreme Court in reviewing the judgment of the Court of Appeals also confirmed that finding—See 144 O. S. at page 107, 56 N. E. Rep. (2nd) 283 (p. 970, R. Vol. 3):

> "*The record here shows* and the Special Master Commissioner found that the A. & P. cancelled stamps in approximately 2.47 per cent of claimed taxable sales, while Kroger cancelled approximately 2.50 per cent of claimed taxable sales."

Under the law on the record the lowest percentage of sales tax is that which is levied upon a 40 cent sale upon which the tax is one cent. *By a simple mathematical calculation, it is plain that that tax which is the lowest possible tax is 2½ per cent. See Court of Appeals Opinion pp. 74, 75 appendix.* If every sale made by the Kroger Company was exactly 40 cents it would follow that the Kroger Company has properly accounted to the State of Ohio. On the other hand if there was a single sale other than for the sum of 40 cents the Kroger Company has defrauded the State of Ohio. See Court of Appeals Opinion (pp. 74-75 appendix).

Turning to the A. & P. Company, there is no possible taxable sale made by that company which would result in as little as 2.47%.

It is contended that these admitted facts demonstrate that this controversy is saturated with fraud.

It conclusively appears from the above quotation from the opinion of Judge Turner that the State of Ohio has been defrauded; that by its judgment and by the reasoning of Judge Turner it does not seek to justify the action of these two vendors, but it permits these two vendors to escape from restoring the fruits of their fraudulent conduct by declaring as a rule of evidence and by improperly placing the burden of proof upon the State of Ohio to prove specific sales, meaning thereby each individual sale of merchandise and to show in connection with each individual sale evidence of failure to deliver to the consumer a proper prepaid tax receipt. It is contended that the fallacy of this reasoning and the unsoundness of this rule of the Supreme Court of Ohio becomes apparent when it is pointed out that these two vendors have together approximately 2,000 stores in the State of Ohio, and that each store has at least one cash register, and some of them many cash registers, and the only possible way the State of Ohio could meet this rule of evidence and the burden of proof thus declared would be to have an inspector of the Tax Commission placed at each cash register during every moment of the entire day of each and every day when those stores were open. It was further contended that while these two chain stores are under investigation in this case there are other chain stores in Ohio and literally hundreds of department stores where the same rule applies, because of failure to obey Section 5546-12 to keep records of sales, and as a result of this entire picture the State of Ohio has been defrauded of many millions of dollars each year.

It is further contended in this connection that this controversy applies only to vendors in Ohio who fail to keep records of sales, although the statute, Section 5546-12, requires *all* vendors to keep records of sales. The failure to keep records is therefore a plain violation of the

statute on the part of chain stores and they are themselves solely to blame that this controversy should arise.

Notwithstanding this showing, Judge Turner, at page 284, 56 N. E. Rep. (2nd) (p. 971, R. Vol. 3), 144 O. S. 108, the opinion, criticized the use of the "average percentage of tax" and criticized the use of "mathematical probabilities" demonstrated by the bracket taxes set out in Section 5546-2 G. C. See Court of Appeals Opinion (pp. 68, 69, 74, 75 appendix).

The Ohio Court of Appeals in adopting and approving the findings set forth in the rules and regulations for audits and making deficiency assessments by the Tax Commission was applying the rule of "*common sense and the experience of men.*" It is contended that the rule laid down in *Mutual Film Company vs. Industrial Commission*, 236 U. S. 230, at page 246, should govern the Court in determining the rights of the parties. It was therein stated by this Court.

> "The terms (of the statute) like other general terms get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct * * *. Upon such sense and experience therefore the law properly relies."

The Supreme Court of Ohio, speaking through Judge Turner in this case, has expressly refused to apply the rule of "common sense and experience of men" and has insisted that nothing can be implied under a tax law as complete as this Sales Tax Act, but that every detail of the *administration* of the Ohio Sales Tax Law must be definitely expressed in the law.

That which Judge Turner was pleased to call *probabilities* are in fact *certainties*.

It was only formulated into a *rule* (authorized by Section 5546-5 G. C.) for auditing the accounts of vendors "for proper administration of this act and to prevent the evasion of the tax" and a means of securing "information" upon which to levy, not a tax, but to establish the amount

of personal liability for the purpose of a *tentative assessment* which would place upon the vendor the duty of requesting a reassessment, which would afford the vendor the opportunity to rebut the "presumption" declared in Section 5546-2 as hereinbefore quoted. There was no exercise of law making power. The Commission only made a *rule* as set forth in this petition.

The total taxable sales as found by the Tax Commission by means of the audit and as found by the Master Commissioner and confirmed by the Court of Appeals made by A. & P. in 1935 after allowing for all exempt sales was $44,442,342.12; that the deficiency in cancellation of prepaid tax receipts therefore amounted to $235,151.82, which based upon 3 cents on each full dollar or 3 per cent plus a penalty of 15 per cent amounted to $270,424.59. Referring to Kroger for the period from January 27, 1935, to September 7, 1935, the total taxable sales made after allowing for all exemptions was $29,291,982.07; that the deficiency in cancellation of prepaid tax receipts, therefore amounted on the same basis to $145,140.96, which with 15 per cent penalty amounted to $164,612.17.

The statute Section 9-a allowed interest thereon at 12 per cent per annum until paid.

The taxes levied, collected and unaccounted for were mingled with and thereby increased the gross receipts of the vendor, and therefore increased the rental to Judge Turner. (See pp. 949, 928, 977, R. Vol. 3.)

We have heretofore quoted from Judge Turner's opinion wherein he admitted that the record shows an accounting by these two vendors of only 2.47 per cent and 2.50 per cent of taxable sales. We now quote from the testimony of the defendant Evatt himself when he was called as a witness in this case:

> "I think during this period, the first year of the sales tax, these two vendors probably, like most vendors, did not collect all the taxes that the law said, or

possibly collected some tax for which stamps were not cancelled. I know that went on the first year, and I am afraid it still goes on now—I hope to a lesser degree." (p. 823, R. Vol. 2.)

Evatt said many vendors collected more than 3 per cent but have not accounted for more than 3 per cent of taxable sales. (p. 553, R. Vol. 2.)

It therefore appears that aside from the patent fraud perpetrated by these two vendors, we have the admission of Judge Turner and the bold declaration of the fraud by the defendant himself.

There is an additional reason why the decision of the Ohio Supreme Court operates as a denial of the equal protection of the laws.

The testimony taken before the Referee showed that there were approximately 300,000 vendors in Ohio and between 40,000 and 50,000 vendors who kept inadequate records. (pp. 447, 459, R. Vol. 1.) See p. 66 appendix.

The vendors of unit sales kept adequate records and were compelled to pay their legal taxes. Approximately 5,000 of those vendors who kept inadequate records were checked, and as a result assessments were levied and they actually paid into the State Treasury deficiency taxes amounting to more than $187,000 without petition for reassessment, all of which was later voluntarily refunded by Mr. Dargusch. The two vendors involved in this controversy, for reasons best known only to Mr. Dargusch, were never assessed, and if this decision of the Supreme Court of Ohio stands, they never will be compelled to account for taxes levied and collected which Mr. Evatt himself practically admits to be owing.

This decision and judgment results in nullifying the tax law. Judge Turner and the majority held, notwithstanding this act was a complete tax law so far as the power delegated to the legislature was concerned, that the power conferred upon the Tax Commissioner to adopt rules and

regulations to carry out the power conferred and duty enjoined to enforce the provisions of the act (Section 5546-5) and the power conferred and duty enjoined under Section 5546-9a did not empower the Tax Commission to make an assessment for personal liability based upon any information in his possession such as sworn reports of vendors and audits of their sales and business, unless the state could prove each specific individual sale. Judge Turner and the majority said this would require the exercise of law making power and writing something into the law.

Further, in order to justify the opinion and the judgment rendered by the Supreme Court, Judge Turner, the court, Evatt and Linton, Special Counsel, took the position that the levy of an *assessment* for personal liability under Section 5546-9a required the levy of a *tax* and the fixing of a rate therefor and that consequently, that required the exercise by the Tax Commissioner of law making power. Your petitioner contended that the assessment for personal liability under Section 5546-9a G. C. was merely an administrative act, under power delegated by the Legislature to enable the Tax Commissioner to fill up the details and make the law effective and operative so as to enable him to discharge his duty and enforce the law as provided in Sections 5546-5 and 9a.

By this decision of the Ohio Supreme Court, the chain stores and department stores, having violated the Sales Tax laws in failing to keep records of sales, are shown special favors. It would logically follow from this decision that since the State of Ohio would be unable to prove specific sales made without the collection of the exact tax, or having collected the tax thereon failed to cancel the proper amount of prepaid tax receipts, the large vendors would not be amenable to any process, if they refused to account for any taxes levied, although they may have collected every penny thereof. This discrimination against the honest vendors who kept records and who made an

honest accounting, and in favor of other and large vendors who openly and defiantly flouted the law, is a clear discrimination and denial of the equal protection of the laws. This result was only reached by an incompetent Ohio Supreme Court placing a strained and untenable interpretation upon certain provisions of the act.

It should be finally noted that the Tax Commissioner assisted by the present Attorney General of Ohio who was then in his department prepared and had introduced in the legislature while this case was pending in the Court of Appeals, a bill which would have authorized and permitted the destruction of all state records 5 years old including those on which the finding and judgment of the Court of Appeals was based. The bill as thus introduced failed to pass due to the vigilance of the Relator and his chief counsel. (pp. 556-560, R. Vol. 2.)

Petitioner files this petition on the .... day of March, 1945, by leave and order of this Court, and files herewith transcript of the docket and journal entries and orders of the Supreme Court of Ohio herein, the record of the Supreme Court pertinent to the questions and issues herein, together with 40 printed copies thereof, the record and transcript of the proceedings in the Court of Appeals which includes the pleadings, order, transcript of docket and journal entries, the Report of Referee and Master Commissioner, and the testimony before the Master Commissioner in printed form as filed in the Supreme Court of Ohio. Ten copies of such record are submitted to the Clerk of this Court.

B.

JURISDICTION.

The petitioner invokes the jurisdiction of this Court under Section 237 Judicial Code U. S., as amended; Section 344 Title 38 U. S. C. A.; F. C. A., and Paragraph (b) thereof.

In addition to the cases hereinafter cited under the heading "Questions" establishing our contention of incompetency of the court arising out of the existence of a pecuniary interest of the Judge writing the opinion and whose concurrence in the judgment rendered was necessary in rendering the judgment, and that it is a substantial question and results in a denial of due process of law and of the equal protection of the laws, we cite in addition the following cases as sustaining the jurisdiction of this Court on the record, since the Federal right and the assertion arose on and out of the action and judgment of the Supreme Court of Ohio itself and that this Court must determine on the facts whether that right or question on the record was waived or could be waived since the Federal question was specifically asserted in the application for rehearing (paragraph 8) and was necessarily denied in the judgment of the court denying the rehearing and overruling the motion to vacate which is the final judgment of the court.

Tumey vs. Ohio, 273 U. S. 510, 522, 523;
Davis vs. Wechsler, 263 U. S. 22, 24;
Tidal Oil Company vs. Flannagan, 263 U. S. 444, 455;
Brickerhoof Faris Co. vs. Hill, 281 U. S. 673, 677, 678, 682;
Saunders vs. Shaw, 244 U. S. 317, 320;
Missouri ex rel. vs. Gehner, 281 U. S. 313, 320, 321;
McKay vs. Kalyton, 204 U. S. 458, 463;
Grannis vs. Ordean, 234 U. S. 385, 392;
Great N. R. Co. vs. Sunburst Oil Co., 287 U. S. 358, 366, 367;
Hall vs. Thayer, 105 Mass. 219, 221.

Chapman vs. Crane, 123 U. S. 540, 548:

"If a federal question is fairly presented by the record and its decision is actually necessary to the

determination of the case, a judgment which rejects the claim but avoids all reference to it, is as much against the right within the meaning of Section 709 of the revised statutes as if it had been specifically referred to and the right directly refused."

See *Honeyman vs. Hanan,* 300 U. S. 14, 21.

Rogers vs. Alabama, 192 U. S. 226, 230:

"It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

The Supreme Court of the United States said it will take jurisdiction where the question was raised in a motion to vacate a judgment of the state court and a federal question was set up.

Here a motion was made by the Relator himself embracing a federal claim, the same as set up in the application for re-hearing. It was supported by affidavits for and against. (pp. 973-979, 909, 929, R. Vol. 3.)

Such a motion and affidavits were also filed by counsel (pp. 923-929, 945-950, R. Vol. 3) setting up the same Federal claim.

This later motion was originally overruled at the same time application for rehearing was denied (pp. 909, 910, R. Vol. 3) and later originally overruled again (p. 910, R. Vol. 3) because overruled originally without oral hearing as required by rule of court. (pp. 923, 910, R. Vol. 3.)

Therefore the federal question was set up and necessarily denied. If the court as constituted was incompetent, then a rehearing was necessary and the judgment had to be vacated because it violated the 14th Amendment to the United States Constitution, that was the controlling question.

The appellee State *ex rel.,* and *appellant Evatt* etc. therein *filed briefs* in which the constitutional *question was*

discussed and denied by the respondent Tax Commissioner; i.e. *the disqualification of Judge Turner.*

All of this was before the court when the petition for rehearing was considered and denied. The question was vigorously urged.

The motion to vacate was denied, without oral hearing as provided by rule of court. On the protest of appellee therein oral argument was allowed and the order denying the motion was set aside.

At the oral hearing the constitutional questions herein set forth were further argued. The motion was again overruled.

The opinion of Judge Turner (pp. 953-972, R. Vol. 3) was rendered and the court entered judgment on August 9th, 1944. (pp. 906, 908, R. Vol. 3.) The application for rehearing was filed the 23rd day of August, 1944. (p. 906, R. Vol. 3.) The motion to vacate judgment was originally filed the 10th day of August, 1944 and again on October 10th, 1944. The application for rehearing was denied November 22, 1944, and final judgment thereon rendered on November 22, 1944. (pp. 907, 909, R. Vol. 3.) Motion to vacate judgment was overruled (p. 910, R. Vol. 3) on November 22, 1944 and again on December 20th, 1944. (p. 910, R. Vol. 3.)

C.

THE QUESTIONS.

The questions involved in this proceeding arise on the record under the 14th Amendment to the United States Constitution. See *Tumey vs. Ohio*, 273 U. S. 510, 522, 523.

The petitioner contended (p. 920, R. Vol. 3) that the disqualification of Judge Turner arising out of a pecuniary interest as set forth in the motion and affidavit of Relator herein (pp. 923, 926, 947, 949, 973, 974, 977, R. Vol. 3) taken in conjunction with the record, transcript, decision

of the court and judgment rendered therein, resulted in denying State of Ohio *ex rel.* Hugh M. Foster:

1. Due process of law.
2. The equal protection of the laws.

(See paragraph 8, Application for rehearing.) (p. 920, R. Vol. 3.)

It was further contended in oral argument on motion to vacate the judgment, setting forth the same grounds,

3. That the decision and judgment of the Supreme Court resulted in stripping the State of Ohio of all remedy to protect itself from frauds upon its sales tax revenue by licensed vendors.

The application for rehearing in that matter and the motion to vacate the judgment was filed in term time, and at the same time as the application for rehearing, containing the same federal claim under the 14th Amendment and was supported by affidavits. Judge Turner filed counter affidavits.

It was not denied that Judge Turner leased to The Kroger Company upon a lease which provided that he was to receive and did receive 5 per cent of the gross receipts of the lessee. Judge Turner did not deny that he leased to the R. & S. Dime Stores on the same basis for 10 years beginning with the year 1936. The existence of this lease was disclosed, for the first time, after judgment by the relator. (pp. 924, 927, R. Vol. 3.) The judgment affected the current, every day administration of the act since 1935, and every year since 1935. It was asserted and not denied that the taxes collected by Kroger and other vendors were mingled with their gross receipts and no separate account kept. (p. 949, R. Vol. 3.)

His lease with Kroger existed in 1935 and extends to the present time. The lease to the R. & S. Dime Stores, Carl G. Rossel, Lessee, runs for 10 years beginning in 1936.

It is contended that this pecuniary interest resulted in a disqualification based upon public policy and rendered the court incompetent to act or to render a judgment and that the judgment was void; that such disqualification could not be waived, because based upon public policy and because Foster was only a taxpayer and not seeking to recover taxes for himself but seeking to recover public revenue for the State and endeavoring to prevent fraud on the revenue. Further, that no disclosure was made of the R. & S. Dime Stores lease.

That the Supreme Court decision resulted in denying the equal protection of the laws in two important particulars.

(1) It discriminated against vendors who kept records of sales as required by Section 5546-12 and in favor of vendors who refused to keep records.

(2) Section 5546-5 permits certain classes of vendors to prepay the sales tax without collection of same from consumers, and as to this class, the tax commissioner established a practice by the process of estimation and employment of percentages to arrive at the amount of the deposit or bond to secure the payment of a proper tax under Section 5546-2. The percentage fixed by the Commissioner ranged from 5 per cent to 7 per cent according to the line of business of the vendor.

This procedure was approved by the unanimous judgment of the Ohio Supreme Court in *Cleveland Concession vs. Evatt*, 143 O. S. 551 (p. 525, R. Vol. 2.)

The Supreme Court decision in the instant case permits all vendors by the simple process of refusing to keep records of sales to escape any personal liability for taxes levied and collected or collectible under Sections 2, 3 and Section 9-a of the act, for which they do not voluntarily choose to account.

At this point in our petition, we will cite without discussion a number of leading cases bearing upon the effect of the disqualification of Judge Turner. A leading case

on this subject is the case of *Tumey vs. Ohio,* 273 U. S. 510, 523. Chief Justice Taft in the opinion held that the disqualification of the mayor who first heard the case was disqualified by reason of having an interest in the judgment amounting to only $12. In support of his conclusions, Chief Justice Taft cited the following cases:

Dimes vs. Grand Junction Canal, 3 H. L. C. 759;
Gregory vs. Railroad, 4 O. S. 675, 678, 679;
Peace vs. Atwood, 13 Mass. 324;
Taylor vs. Commissioners, 105 Mass. 225;
Kentish Artillery vs. Gardiner, 15 R. I. 296;
Moses vs. Julian, 45 N. H. 52;
State vs. Crane, 36 N. J. L. 394;
Railroad Company vs. Howard, 20 Mich. 18;
Stockwell vs. Township, 22 Mich. 341;
Findley vs. Smith, 42 W. Va. 299;
Nettleton's Appeal, 28 Conn. 268;
Cooley's Constitutional Limitations, 8th Ed. Vol. 2, 874.

In addition to those citations, we cite the following additional authorities:

Queen vs. Justices of Hertfordshire, 6 Q. B. 753; 115 Rep. 284;
Slacum vs. Sims & Wise, 5 Cranch (U. S.) 363;
Rapid City First National Bank vs. McGuire, 12 S. D. 226; 80 N. W. 1074;
Capran vs. Van Noorden, 2 Cranch (U. S.) 125, 126;
Signourney vs. Sibley, 21 Pick. (Mass.) 101;
Kentish Artillery vs. Gardiner, 15 R. I. 296;
Lee vs. British American Company, 51 Tex. Civ. App. 272.
Richardson vs. Welcome, 6 Cush. (Mass.) 331-333.

We reserve discussion of those authorities until we come to the brief which will be attached to and made a part of this petition. We point out at this time the dis-

tinction which opposing counsel will try to draw between the Tumey case and the instant case. Tumey's counsel objected to the mayor on the ground of interest before the trial. In the instant case, chief counsel was not present and did not even know of Judge Turner's declaration of disqualification until after the cause had been argued and submitted. There is no record of any waiver by petitioner. The courts have held a record on such an important matter is doubly important. All that there is here is the memory of those who seek to justify Justice Turner sitting. This can be quite uncertain. Our contention is, as shown by authorities, that no one had a right to waive the disqualification because this is a case involving public policy, and the relator in this case is only one of several millions of taxpayers in Ohio. Further Judge Turner disclosed only his interest in the Kroger lease, not in the lease to R. & S. Dime Stores.

D.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The Supreme Court of Ohio has rendered a decision and judgment reversing the Court of Appeals and that decision and judgment raises a question of the violation of the 14th amendment to the United States Constitution as herein set forth.

In the application for a re-hearing and motion to vacate filed in the Ohio Supreme Court the question of the violation of the 14th Federal amendment was set forth and the authorities relied upon were cited and discussed but the application for re-hearing was overruled without any opinion being rendered by that court.

By reason of the decision having been rendered by a bare numerical majority of the court and by reason of one of the judges who wrote the opinion and concurred in that decision, whose concurrence was necessary to the rendition

of the judgment, by reason of having a pecuniary interest in the final judgment, that decision and the denial of the application for re-hearing has resulted in the application of principles not in accord with applicable Federal decisions and probably in the application of principles which have not heretofore been determined by the United States Supreme Court.

There was no Federal question asserted in the trial and decision of this controversy and the Federal question did not arise until it had been decided upon its merits by an improperly constituted court.

(2) The judgment of the Ohio Supreme Court rendered by a bare majority of that court reversing the judgment of the Court of Appeals rendered by the unanimous judgment of that court was erroneous as we have set forth in the statement heretofore set forth in this petition and as we shall further argue in the brief filed in support of this petition.

In the event this petition for certiorari should be allowed, we shall assume unless otherwise advised by the court that the Supreme Court of the United States will not consider and decide the merits of the original controversy but that it will merely determine whether or not there has been a violation of the 14th Federal amendment and whether or not the members of the Ohio Supreme Court who participated in the reversal constituted a constitutional court and in the event the court should determine that issue in favor of this petitioner that the court would then remand the question to the Supreme Court of Ohio for reargument.

Tumey vs. State of Ohio, 273 U. S. 510 at pages 523, 535.

(3) By virtue of the Ohio Sales Tax Act all vendors of taxable merchandise in Ohio are required to collect from their customers the amount of the tax upon each item of

taxable merchandise and to pay the same into the State Treasury. The statute, Section 5546-12 requires all vendors to keep records of their sales. It was found in Ohio that numerous chain stores and department stores and other classes of vendors who sold merchandise in small amounts involving a large number of items were not keeping records of their sales, and that there was no means to determine whether they were paying into the State Treasury the exact amounts of the taxes which were being collected by them on each sale. Thereupon the Tax Commission of Ohio charged with the duty of administering and enforcing the act and also being empowered by Section 5546-5 to adopt and promulgate rules and regulations deemed by it to be necessary to enforce and administer the act, did through its Research Department determine for the purposes of a tentative assessment against such vendors the fair percentage which under the bracket tax of Section 5546-2 of the act, the taxable sales of different classes of vendors would yield in aggregate taxes from each of such classes. (pp. 583-585, R. Vol. 2.) It was determined for the purposes of such tentative assessment that the average probable taxes which should be collected by chain food stores would be approximately 3.301% of such taxable sales.

It not being possible to check each individual sale where no records were kept, the Tax Commission employed approximately 60 inspectors to ascertain the aggregate volume of all taxable sales. All vendors were further required by law to make reports at regular intervals of the total volume of their taxable sales and the amounts of money which they had collected from their customers. The reports filed by the Kroger Grocery and Baking Company and the Great Atlantic and Pacific Tea Company showed that they did not comply with law and were collecting and were accounting for taxes in the one case only on a basis of 2.50% and in the other, on a basis of 2.47% of taxable

sales. Thereupon an audit was made by the inspectors, which indicated the same deficiency. The Tax Commission had checked the books of account of approximately 5,000 other small vendors and had collected from them the sum of approximately $187,000.

When the two vendors involved in this controversy were notified of the results of the audit of their books, the attorney for the Kroger Company protested and thereupon a meeting was held in the office of said attorney in Cincinnati (pp. 436-456, R. Vol. 1), which meeting was attended by numerous employees of the Tax Commission and soon thereafter, one Carlton Dargusch, a member of the Tax Commission who was assigned by the Commission to administer the act and who initiated the abandonment of these taxes, resigned his commission in the Tax Department of the State to accept employment with the Kroger Company. (p. 784, R. Vol. 2.) Before resigning he entered an order reciting in substance that since some vendors kept adequate records and other vendors kept no records, preventing the Tax Commission from detecting each specific sale "it shall be deemed that no deficiency exists against the vendors" and entered another order upon the journal of the commission revoking the action of the commission in collecting approximately $187,000 from other violators.

Thereupon the relator in this case as a taxpayer filed an action in the Supreme Court of Ohio seeking to have that court find the amount due from these two vendors and by writ of mandamus compel them to pay the amount found due into the State Treasury, 136 O. S. 295. That suit was dismissed on the ground that these vendors were not officials, trustees or agents of the State and therefore not amenable to the writ of mandamus, the court declaring the only remedy was to require an assessment. Thereupon this suit was filed in the Court of Appeals of Franklin County, Ohio, and the proceedings in that court and the

further proceedings in the appeal to the Ohio Supreme Court are more fully set forth in the earlier pages of this petition.

(4) By virtue of the Ohio sales tax, every citizen of Ohio from the lowest to the highest becomes a taxpayer by the purchase of taxable merchandise. The vendor is not the taxpayer under any of the sections of the law invoked in this proceeding which have not been changed since 1935 and he is made the tax collector. (Sections 2 and 3 of the act.) Every such consumer taxpayer has a right to expect that the money which they pay to vendors of taxable merchandise shall be paid into the State Treasury. It is believed that taxpayers as a rule are quite philosophical about the payment by them of their legimate taxes and as a general rule it is sought to make taxes payable by a uniform rate or at least have them fall equitably upon all classes of taxpayers. In any event it is inexcusable and highly reprehensible for large corporations dealing in taxable merchandise to collect the taxes and fail to account for them.

(5) In this litigation it is nowhere argued by the Attorney General of Ohio that these two vendors have accounted for monies that they have received from their customers. The Supreme Court of Ohio in the opinion of Judge Turner concedes that they have not done so because he states that the record shows that one of these vendors has accounted for only 2.47% of taxable sales and the other 2.50% of taxable sales. There is not a single item of taxable merchandise where the bracket tax under Section 5546-2 would be less than 2.50% of taxable sales, and every sale would have to be at 40¢. It follows therefore that there must necessarily be deficiencies due and owing from these two vendors.

It was not sought in this controversy to have the courts to find the amount due or by process of execution to collect the same. It was only sought to have the courts apply the

provisions of the statute and the proper rules of the commission adopted pursuant to legislative authority in levying an *assessment* against these vendors, so that these vendors could by application for reassessment have a further hearing before the Tax Commission in which Section 5546-2 and 5546-9a would impose upon such vendors the burden of showing the assessment was incorrect and prove the correct amount due to the State of Ohio and after determination of such reassessment give to the vendors the right of appeal to the courts as provided by Section 5546-9a.

(6) The opinion written by Judge Turner and the syllabus concurred in by three other members of the court shows that the majority of the Supreme Court have utterly misconceived the character of this suit. It is the theory expressed by Judge Turner that the relator in this case seeks to inject into the sales tax law by implication certain matters which the Legislature has omitted; that the decision of the Court of Appeals results in the levy of a *tax* against these vendors without further action on the part of the Tax Commission and that tax is arrived at by a percentage method instead of by calculation under the bracket tax set forth in Section 5546-2.

In this Judge Turner and the majority of the court are clearly mistaken. There was abundant authority in the statutes for doing everything which the decision of the Court of Appeals has commanded. The Court of Appeals did not order the levy of a tax. They merely commanded the Tax Commission to levy an *assessment* for personal liability for the amount of taxes levied and collectible from consumers on retail sales made by them for which they did not account based on the information in the possession of the Tax Commission, and to start in motion the machinery which would afford these two vendors the right to prove that the assessment made against the vendors was erroneous and excessive and that they had paid into the

State Treasury all the monies collected by them from consumers. The present Tax Commissioner of Ohio who is resisting the collection of the deficiencies from these two vendors voluntarily testified before the referee. We quote the following from that record (p. 839, R. Vol. 2):

> "The Referee: And you do not challenge the efficiency and the accuracy of the audits that were made, do you?
>
> The Witness: I have no basis to challenge them—no basis upon which to challenge them.
>
> The Referee: Audits were made and if those audits were correct, if they were efficient and are accurate, those audits do show that they were not collecting as much as 3% of their taxable sales, do they not?
>
> The Witness: I think that is correct."

In at least one other place in the record of the testimony taken before the Referee, the defendant Evatt states that he does not question the efficiency and accuracy of the work of the auditors.

(7) We call attention to another portion of the testimony of Mr. Evatt when he appeared before the Referee. We quote from page 525, R. Vol. 2:

> "Q. But you don't know, have in mind anything in your mind, from your observation and experience, where they are collecting more than three per cent sales?
>
> A. Yes, where we authorize prepayments upon finding that it is impracticable, to use the wording of the statute, to cancel tax receipts, such as concessioners of the baseball parks and circuses, we are permitted to grant them authority to pay the tax and not cancel tax receipts. In those cases we grant authority by making a survey in which we estimate the approximate number of sales at different prices, as, for instance, a vendor selling ten cent programs at a ball park, if all of the sales were single sales it is a ten per cent tax; however, there are sales where an individual

would buy two, three or four programs; this being a bracket tax, the percentage therefore on those sales is lower. We endeavor to strike an estimate of what we think the return would be by cancellation of stamps and we will grant permission on the grounds that they will pay a certain percentage of their gross sales. That varies according to our inspection from three and a half up to sometimes I think six or seven per cent."

This testimony pertained to Section 5546-5 which in Paragraph 2 gave permission to certain classes of vendors to pay the sales tax without collecting the same from their customers. That paragraph required the Tax Commission to conduct a hearing to determine "the conditions of the applicant's business" and whether it is impracticable to collect the tax in the manner otherwise provided in the sales act, and it further provides that the applicant shall furnish "bond payable to the State of Ohio in such amount as the Commission may deem to be sufficient to secure the prepayment of the taxes levied by this act in the manner desired * * *."

There is nothing in words in that section (5546-5) which states in what manner this determination shall be made, and there is certainly nothing in words in that statute which authorizes a Tax Commissioner to make any determination of liability by average percentage rates, any more than is contained in Section 5546-9a.

The Supreme Court of Ohio has definitely approved this procedure on the part of the Tax Commissioner in the case of *Cleveland Concession vs. Evatt*, 143 O. S. 551, in which case Judge Turner wrote the opinion. It is apparent therefore that both the Tax Commissioner and the majority of the Supreme Court of Ohio have been inconsistent. The Supreme Court of Ohio in the *Cleveland Concession* case has as we think approved the employment of the average percentage rates in determining a tentative liability for taxes collectible and has disapproved of it

when it was sought to have a tentative *assessment* made by the same method in the instant controversy.

(8) We think it is proper to state as one of the reasons for the allowance of the writ in this case that the action of the Tax Commissioner and the action of the Attorney General of Ohio and the decision of the majority of the Supreme Court of Ohio has become well known to the taxpayers of Ohio and especially to the legal profession in Ohio, and that the inconsistent action on the part of the state officials has been a shock to the citizens of Ohio, and that it tends to detract from the confidence of the people of Ohio in the courts.

We have alleged at length in this petition the importance of this appeal from the standpoint of legal procedure and legal ethics and the necessity of maintaining and upholding the respect of the people for the judicial branch of our government.

It is not less important to know the economic issues which stand out like a sore thumb in this controversy. Ohio has taken just pride in having built up a cash surplus in the Treasury of 92 million dollars which all authorities agree should be kept intact as a fund to be employed in post-war public improvements and to give employment to returning soldiers. If 92 million dollars is a commendable surplus to be preserved against the post-war period, truly it must be admitted that if that surplus were 150 millons, the situation would be that much more favorable. We confidently assert that if the sales tax law of Ohio had been rigidly administered, and if all chain stores and department stores had been compelled to turn into the State Treasury the money which they have actually collected from the consuming public that surplus would have been not less than 150 million dollars.

It is a matter of common knowledge and therefore public knowledge that the severe economic depression which began in 1929 extended through 1935 and 1939 and was

accompanied with wide-spread human suffering throughout the nation and more particularly in Ohio. The situation in Ohio was rendered particularly acute because in 1934 a constitutional limitation was placed upon collection of real estate taxes resulting in a loss of not less than 65 million dollars of revenue per year.

This loss of revenue created deficiencies which threatened to break down poor relief, pensions, the needs of schools and municipalities. It was sought to remedy this situation by the enactment of this Sales Tax Law. If this law had been honestly, faithfully and efficiently administered in the interests of the State instead of the large vendors, all needs would have been met but by the reason of faulty and discriminatory administration, not to use stronger language, the Federal government was called upon for large contributions and except for those contributions the needs of poor relief, pensions, schools and cities could not have been met.

It was therefore highly reprehensible on the part of Carlton Dargusch and his successor William S. Evatt and the Attorney General of Ohio, including his special counsel James N. Linton, former attorney for one of these vendors, to defend patent evasions of the law and to prevent the accounting by such large vendors for monies which had been paid to them by their customers, the consumers. Mr. Dargusch resigned to accept employment with Kroger. (p. 784, R. Vol. 2.)

Clarence O. Sherrill has acquired a national reputation as the efficient city manager of the City of Cincinnati. Mr. Sherill was a former official of the Kroger Company. As an outstanding public-spirited citizen, Col. Sherrill has become interested in the Sales Tax Law and has become an advocate of sweeping revisions of that law for the purpose of preventing patent frauds. We quote from a pamphlet which has been given wide publication by him:

> "On the basis of estimated collections by the bracket method now in use, the consumer is apparently paying as much as 3½ to 4% average tax on purchase price instead of the 3% required by the Sales Tax law and the fact that the retailers are not required to pay more than 3% on taxable sales, results in a loss to the State in revenue of probably $10,000,000 to $15,000,000 a year. In addition to this leakage of revenue to the State Treasury after it is paid by the consumer, there is also the heavy loss from use of prepaid sales tax receipts, over and over again."

There is more involved in this present case than the amount recoverable from these two vendors. This was conceded by Mr. Linton, the special counsel even for the year 1935, at page 6 of his brief in the Ohio Supreme Court. After stating the question involved as he conceived it he says:

> "The answer to the above question is of the greatest importance to this defendant and *many thousands of vendors for the year 1935.*"

Quite recently a member of the Ohio Senate requested the chief of the Sales Tax Division for an estimate of the amount of money the state was losing in revenues by reason of the acts herein alleged. The head of the Sales Tax Division gave an estimate, which was confirmed to your petitioner, that the state was losing at least five to eight million dollars a year, due to the claimed inability, to make the vendors keep records of sales and account for tax collections and to assess for a personal liability under Section 5546-9a—and the rules of the commission—where such vendors do not keep records of each specific sale.

Therefore, since a federal right was seasonably set up and denied, there exists grave, weighty reasons, growing out of considerations of public policy, public interest and the principles of natural justice, arising out of questions, which have been determined in a way not in accord with the applicable decisions of this Court, and why this Court

should take jurisdiction, and ultimately reverse the decision and judgment of the Supreme Court of Ohio herein.

Certainly, there is nothing in our constitutional structure, state or national, which admits of any branch of the government, administrative, legislative or even judicial, to openly and knowingly suffer such large vendors (tax collectors) to collect millions of dollars of taxes each year from the consuming public for essential public functions and purposes, and then permit them to appropriate it to their own use, upon the theory that no remedy exists—where such vendors refuse to keep a record of sales in compliance with the statute and the state cannot prove each specific sale, as a result of such failure.

The decision of the Court of Appeals in this case would effectively remedy that situation. The reversal of that decision by the Supreme Court has completely changed and destroyed that situation and nullified the law and the object and purpose of the law.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Ohio commanding that court to certify and to send to this court for review and determination, on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 29779, State of Ohio *ex rel.* Hugh M. Foster vs. Evatt, Tax Commissioner; and that said judgment of the said Supreme Court of Ohio may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

STATE *Ex Rel.* HUGH M. FOSTER, *Petitioner,*

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